

# Exhibit A – Declaration of Peter Ashdown

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UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH, CENTRAL DIVISION

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XMISSION, L.C., a Utah company,

Plaintiff,

vs.

9 FOUR ONE MEDIA, a Florida company;  
ABOVE ALL OFFERS CORPORATION, an  
Oregon corporation; THE AFFILIATI  
NETWORK, Inc., a Florida corporation;  
AGORA FINANCIAL, LLC, a Maryland  
limited liability company; FLUENT, LLC a  
New York limited liability company; DOES 1-  
10,

Defendants.

**DECLARATION OF PETER L.  
ASHDOWN IN OPPOSITION TO  
MOTION TO DISMISS [ECF 22]**

Case No.: 2:18cv00182 DBP

Judge Dustin B. Pead

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I, Peter L. Ashdown, being first duly sworn, do hereby declare as follows:

1. I am over the age of 21 and have personal knowledge of the matters set forth in this Declaration. If called to testify, I could do so competently.
2. I am the founder of XMission, L.C.
3. I am currently the Chief Technical Officer and President of XMission.

4. I founded XMission in 1993 as Utah's first Internet Service Provider ("ISP"). On October 6, 1993, I filed the Articles of Organization of XMission, L.C. with the State of Utah.

5. XMission is a widely known and well-recognized ISP in Utah.

6. XMission owns all the servers, routers, and switches on its network through which it hosts and provides its Internet access services for its customers.

7. Consistent with its mission to provide the best Internet services possible, XMission has invested in a sophisticated data center and an efficient cooling system to improve the proficiency of its equipment.

8. XMission has had to consistently update, upgrade and augment its expansive network and infrastructure in order to combat ongoing spam problems.

9. XMission is the sole owner of all its hardware, and has complete and uninhibited access to, and sole physical control over, the hardware.

10. XMission provides Internet access services to both commercial and residential customers.

11. The e-mail accounts hosted and served by XMission include e-mail accounts owned by third-party customers of XMission, e-mail accounts owned by employees and/or customers of XMission's third-party customers, e-mail accounts owned by employees of XMission, and also e-mail accounts owned by XMission itself.

12. The publicly available registration information in the WHOIS database for XMission's domains identifies XMission as being located in Utah. *See Exhibit 1* hereto.

13. Any email sent to any domains hosted by XMission will, by design, arrive on XMission's email servers in Utah as XMission's physical infrastructure through which it provides its services is in Utah.

14. Between 2015 and present, Fluent has caused the transmission of at least 10,354 commercial emails to XMission's email servers in Utah on a repeated and continuous basis.

15. The Complaint in this case only complains of 10,141 emails. This is because XMission did not identify a number of the additional emails linking to Fluent's websites until after it filed its Complaint, and because XMission has received an additional 23 emails linking to Fluent's websites since it filed its Complaint.

16. Attached hereto as Exhibit 2 are true and correct copies of a few of the emails received. These emails are representative examples of many thousands of other emails.

17. The emails in question linked the recipients directly to Fluent controlled data gathering domains. Specifically: onlineretailusa.com (747 emails at issue), restaurantpromotionsusa.com (7,397 emails at issue), retailpromotionsonline.com (914 emails at issue), surveysandpromotionsonline.com (553 emails at issue) and others.

18. The 10,354 emails were sent to over 1,100 different Utah customers of XMission's services.

19. Among the 10,354 emails are 1,293 (12.7% of the total) which were specifically targeted at email addresses that contain Utah in the domain name. [REDACTED]

20. Not only are the recipients of the emails located in Utah, the actual email addresses identify the location of the recipients and there could be no mistake about where these emails were being sent.

21. Also, the WHOIS registration information for the domains identifies such as [REDACTED] being located in Utah. [REDACTED]

[REDACTED] Additionally, some of Fluent's emails appear to have actually been sent to XMission from within the state of Utah from the sender domain solitaryworld.net. See WHOIS showing the location of solitaryworld.net in Utah, attached as Exhibit 5 hereto.

23. As the result of the emails, XMission has received 5,271 customer complaints of spam, which directly affects XMission's reputation and good will with its customers as well as the perceived quality of its services.

24. The harm that XMission has suffered as the result of spam, including these emails, includes, but is not limited to, financial expense and burden; lost time; lost profitability; decreases in the life span of XMission's hardware; server and bandwidth spikes; server crashes; and pre-mature hardware replacement, customer complaints, and most importantly, customer cancellations.

25. All of the foregoing harm has been suffered by XMission in Utah.

I declare under penalty of perjury of the laws of the state of Utah, in which state I sign this Declaration, that the foregoing is true and correct.

EXECUTED this 9th day of May, 2018.

/s/ Peter L. Ashdown

Peter L. Ashdown

(\* I certify that I have the signed original of this document which is available for inspection during normal business hours by the Court or a party to this action.

\*Declaration electronically signed, pursuant to U.C.A. § 46-4-201(4) and District Of Utah CM/ECF and E-filing)